Supreme Court, U.S.
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(2)

No. 91-1738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JERRY D. GILMORE, Petitioner

-vs-

KEVIN TAYLOR, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Kevin Taylor, by and through his counsel, Robert Agostinelli, Deputy Defender, Office of the State Appellate Defender, Third Judicial District, requests leave to file the attached Respondent's Brief in Opposition, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The Respondent was previously granted leave to proceed in forma pauperis in this cause in the Illinois Appellate Court.

The Respondent's affidavit in support of this Motion is attached hereto.

Robert Agostinelli
ROBERT AGOSTINELLI

SUBSCRIBED AND SWORN TO
Before me this 7th day of
July, 1992.

Donna Barr
Notary Public

OFFICIAL SEAL
DONNA BARR
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-9-95

16 pgs

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-vs-

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A F F I D A V I T

I, Kevin Taylor, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Unemployment $600.00 Per month [redacted] August. 1985

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No

_____

_____

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? ____

No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Katie Jean Taylor Daughter

_____

I understand that false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Further affiant sayeth not.

Kevin Taylor
KEVIN TAYLOR

SUBSCRIBED AND SWORN TO
Before me this 17 day
of June, 1992.
Robert L Price
Notary Public

" OFFICIAL SEAL "
ROBERT L. PRICE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 4/18/95

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-vs-

KEVIN TAYLOR, Respondent

CERTIFICATE OF SERVICE

I, Robert Agostinelli, a member of the bar of this Court and representing Petitioner in this cause, certify:

(1) That I have served one copy of the Motion for Leave to Proceed in Forma Pauperis, the Affidavit in support thereof, and Respondent's Brief in Opposition on counsel for Respondent, by depositing same in a United States Post Office mail box, with first class postage prepaid, and with the envelope addressed as follows:

Hon. Roland Burris	Mr. Terence M. Madsen
Attorney General	Mr. Douglas K. Smith
100 W. Randolph - 12th Floor	Asst. Attorneys Generals
Criminal Appeals Division	500 S. Second Street
Chicago, Il. 606061	Springfield, Il. 62706

(2) The above named parties are the only parties required to be served.

Robert Agostinelli
ROBERT AGOSTINELLI

SUBSCRIBED AND SWORN TO
Before me this 7th day
of July, 1992.

Donna Barr
Notary Public

OFFICIAL SEAL
DONNA BARR
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-9-96

No. 91-1738

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JERRY D. GILMORE, Petitioner

-vs-

KEVIN TAYLOR, Respondent

On Petition for Writ of Certiorari
To The
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Has the State waived any claim of applying Teague v. Lane, 489 U.S. 288 (1989) to Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990)?

II. Should the State's belated claim that no due process violation occurred in the instant case be rejected since they conceded before both the district court and the Court of Appeals that the instructions at issue had, in fact, violated due process?

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THIS COURT SHOULD REJECT THE STATE'S CLAIM THAT NO DUE PROCESS VIOLATION OCCURRED BECAUSE THE STATE CONCEDED BEFORE BOTH THE DISTRICT COURT AND COURT OF APPEALS THAT THE INSTRUCTIONS AT ISSUE HAD, IN FACT, VIOLATED DUE PROCESS. 6

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

A copy of the relevant decisions including the January 21, 1992 decision of the United States Court of Appeals for the Seventh Circuit are appended to the certiorari petition.

JURISDICTION

This Court maintains jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Amplification and clarification of petitioner's factual statement have been incorporated within the argument.

ARGUMENT I

THIS COURT SHOULD REJECT THE STATE'S BELATED ATTEMPT TO APPLY TEAGUE V. LANE, 489 U.S. 288 (1989) TO FALCONER V. LANE, 905 F. 2D 1129 (7TH CIR. 1990) SINCE THE STATE FAILED TO RAISE THAT ISSUE IN THREE PRIOR CASES, INCLUDING FALCONER V. LANE ITSELF.

The centerpiece of the State of Illinois' Petition for Certiorari is a Teague v. Lane attack on Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), a two year-old Seventh Circuit habeas corpus decision. Teague v. Lane, 489 U.S. 288 (1989). This Court should deny the petition for certiorari because the State of Illinois failed to raise this Teague challenge in the Falconer case itself. Moreover, the State of Illinois failed to raise Teague v. Lane in two subsequent Seventh Circuit decisions granting writs of habeas corpus on the basis of Falconer. Denying the State of Illinois' petition will show that the State may not pick and choose when to raise a Teague v. Lane challenge. Because Teague v. Lane is a threshold, yet non-jurisdictional, issue in a habeas case, the State must "use it or lose it".

In the case at bar, the Seventh Circuit applied existing precedent -- its holding in Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990) -- in granting a writ of habeas corpus. In its Petition for Writ of Certiorari, the State of Illinois is now asking this Court to hold that the granting of the writ of habeas corpus in Falconer was barred by this Court's decision in Teague.

Note that the State is not claiming that the opinion in the case at bar created a new rule under Teague; rather, it is claiming that Falconer -- a decision over two years old -- violated Teague.

Interestingly, the State of Illinois never raised a Teague v. Lane issue in Falconer. The failure to raise the issue two years ago is proof per se that the State's position is untenable. Yet to fully appreciate the audacity of the State's position, it is important to understand the chronology of events affecting these issues.

On February 22, 1989, this Court decided Teague v. Lane, which held that new rules of criminal procedure should generally not be applied retroactively to cases on collateral review. This Court characterized retroactivity as a "threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Teague, 489 U.S. at 300. This Court has held that the Teague rule is not "jurisdictional" in the sense that a court must raise and decide the issue sua sponte. See Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 2718, 111 L. Ed. 2d 30 (1990). Rather, the goal of Teague is to prevent "'selective application of new rules [thus] violat[ing] the principle of treating similarly situated defendants the same'." [Teague, 489 U.S. at 304, quoting Griffith v. Kentucky, 479 U.S. 314, 323-324, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987) citing Desist v. United States, 394

U.S. 244, 258-259, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) (Harlan, J., dissenting].

As shown below, the State's belated Teague v. Lane claim flies in the face of the goal of Teague -- similar treatment for similarly situated defendants.

The State of Illinois filed its brief in Falconer v. Lane on October 13, 1989. Note that this is almost eight months after Teague v. Lane was decided. Its brief makes no mention of Teague v. Lane. Oral argument in Falconer was held February 26, 1990 -- over one full year after Teague v. Lane was decided. Again, the State of Illinois apparently made no use of Teague v. Lane. Indeed, in its opinion in Falconer the Seventh Circuit pointedly noted that the State had failed to raise a Teague v. Lane claim, thus obviating any need to even discuss the case. Falconer v. Lane, 905 F.2d 1129, 1137 (7th Cir. 1990).

Obviously, the State felt that Teague was inapplicable to a Falconer claim. Any lingering doubt on this score had to be removed when the Seventh Circuit relied on Falconer in granting a habeas corpus petition in Rose v. Lane, 910 F.2d 400 (7th Cir. 1990), cert. denied, 111 S. Ct. 515 (1990) and United States ex rel. Fleming v. Huch, 924 F.2d 679 (7th Cir. 1991). Both cases concerned the same faulty Illinois jury instructions; both decisions relied on Falconer in granting relief; in neither case did the State of Illinois raise a Teague v. Lane claim.

The State of Illinois long ago lost the right to raise a Teague v. Lane claim against the Falconer decision. Granting

this petition would reward the State of Illinois for sloppy lawyering. Granting this petition would vindicate a State's right to flout the holding of Teague v. Lane by arbitrarily discriminating among similarly situated defendants. Granting this petition would open the door to a defendant's claim that the State had an "improper motive" in singling him out for a Teague v. Lane claim. See Wade v. United States, No. 91-5771, 60 U.S.L.W. 4389, decided May 19, 1992.

The Court has shown a proper regard for raising and preserving issues in a timely manner. In Coleman v. Thompson, 501 U.S. ___, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), defendant's lawyers missed Virginia's notice of appeal deadline by three days; this precluded Coleman from receiving any federal review. Here, the State of Illinois' delay is not merely three days, but three cases. Such misuse of Teague must be met with a denial of the petition for a writ of certiorari.

ARGUMENT II

THIS COURT SHOULD REJECT THE STATE'S CLAIM THAT NO DUE PROCESS VIOLATION OCCURRED BECAUSE THE STATE CONCEDED BEFORE BOTH THE DISTRICT COURT AND COURT OF APPEALS THAT THE INSTRUCTIONS AT ISSUE HAD, IN FACT, VIOLATED DUE PROCESS.

In its Petition for Writ of Certiorari, the State of Illinois asks this Court to grant certiorari "to resolve a circuit split on the proper scope of the due process clause."

(Petition, p. 5). This constitutional issue was never raised by the State in either the district court or the Seventh Circuit. Because the State has provided no excuse for not having raised this issue in the courts below, this Court should deny the petition. See Patrick v. Burget, 486 U.S. 94, 99, n.5, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988) citing Youakim v. Miller, 425 U.S. 231, 234, 96 S. Ct. 1399, 47 L. Ed. 2d 701 (1976) (per curiam).

The opinion of the district court below explicitly states "The State concedes that, under the current state of the law, the jury instructions used in Taylor's trial amount to a due process violation." U.S. ex rel. Taylor v. Gilmore, 770 F. Supp. 445, 446 (C.D. Ill. 1990). Moreover, the opinion of the Seventh Circuit below notes that "Illinois prudently concedes that the instructions given Taylor's jury were defective, and challenge the vitality of neither [People v.] Reddick nor Falconer [v. Lane]." Taylor v. Gilmore, 954 F.2d 441, 442-443 (7th Cir. 1992). This blatant "sandbagging" by the State is reason enough to deny the petition for certiorari. Patrick, 486 U.S. at 99, n.5 ("This court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court"); Adickes v. Kress & Co., 398 U.S. 144, 147, n.2, 90 S. ct. 1598, 26 L. Ed. 2d 142 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them") citing Lawn v. United Sates, 355 U.S. 339, 362-3, n.16, 78 S. Ct. 311, 2

L. Ed. 2d 321 (1958); Husty v. United States, 282 U.S. 694, 701-02, 51 S. Ct. 240, 75 L. Ed. 629 (1931); Duignan v. United Sates, 274 U.S. 195, 200, 47 S. Ct. 566, 71 L. Ed. 996 (1927).

The State's failure to raise this issue before the lower courts a fortiori proves its lack of merit. Moreover, Judge Flaum's cogent opinion for a unanimous court fully explains the due process violation in this case. See Taylor, 954 F.2d at 450.

The State's failure to raise any due process issue in the lower courts merits a denial of its petition for certiorari.

CONCLUSION

For these reasons, respondent Kevin Taylor submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 7, 1992